# No. 14,810

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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HAROLD HUTSON,
*Appellant,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

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**On Appeal from the District Court of the United States for the District of Alaska, Fourth Judicial Division.**

## BRIEF FOR APPELLEE.

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### JURISDICTION.

The jurisdiction of the District Court below was based upon the Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended, 48 U.S.C. 101.

The jurisdiction of this Court of Appeals is invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 929, as amended, 28 U.S.C. 1291.

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### COUNTERSTATEMENT OF THE CASE.

On the evening of March 28, 1954 the appellant was at the Mead residence, which was located at 508 Sixth

Street, Hamilton Acres near the Town of Fairbanks, Alaska. Virginia Mead, who was eleven years of age, lived at this house with her sister and Joe Baird, who took care of the children. Her mother was working at Mount McKinley Hotel.

Virginia had broken an "E" string on her violin so she went with appellant and Joe Baird to procure one. Upon returning home, Joe Baird left to buy some liquor, so Virginia went to the Perry residence. Later she went home to bed. Virginia, her sister, and the appellant were the only persons in the house when the following events took place:

"Q. (By Mr. Yeager): And what happened after you went to bed?

A. Well, Mr. Hutson came in our room.

Q. And what happened then, Virginia?

A. And then he asked me to kiss me, and I said I didn't want to and then he kept telling me to and I kept telling him I didn't want to, and I told him to go home but then Joe Baird was, had gone out to get some more whiskey and he said that he couldn't leave until he got his car back, and so he got mad and he kept telling me to kiss him and then I told him no, and he said he had a gun and he wanted me to put my mouth on his thing.

Q. And what happened then?

A. And then I did it and then I asked him for a drink of water and thought I might go out the back door, but he wouldn't let me. I never got to, and then I ran out the front door over to Marian's house.

Q. Now, who, what do you mean by Marian's house?

A. Marian Perry.
Q. And what do you refer to as "his thing"?
A. His penis.
Q. Will you state whether or not he put that in your mouth?
A. He did." (Tr. 43,44.)

After this incident, Virginia ran next door to Perry's house, barefooted, without a coat or hat and in a hysterical condition. About one o'clock Mrs. Perry heard the screaming of the little girl and called her husband. As she went to the door, Mrs. Perry overheard a man say "what do you want to go in and bother them for, honey?" (Tr. 53.)

Mr. Perry seized a crowbar and ran over to the appellant's home. There he threatened Hutson with the crowbar but was deterred when Hutson remarked to him that he, Hutson, had a 25 caliber automatic under his pillow. (Tr. 64.) Perry then left appellant's house and called the Territorial Police. Virginia had also testified that Hutson had told her that he had a gun.

Hutson was arrested on the complaint of Frank Perry, incarcerated, and on the 14th day of April 1954 received a preliminary hearing on the charges presented against him. At the time, Mr. T. N. Gore, Jr., a law clerk in the office of R. J. McNealy, conducted the preliminary hearing and cross-examined Virginia Mead for over an hour. Gore was an attorney, and in fact a former assistant U. S. attorney, but had not been admitted to practice in the Territory of Alaska. The defendant was indicted by the grand jury on

the 7th day of January 1955 for the crimes of Unnatural Carnal Copulation and Contributing to the Delinquency of a Minor. He was arraigned on the 18th day of January, at which time the Clerk of the District Court handed him a copy of the indictment. The trial of the case was delayed because the attorney of record, R. J. McNealy, was absent from Fairbanks attending the Territorial Legislature. The case was set for trial on April 18, 1955. On the morning of April 18, 1955, Mr. George B. McNabb, Jr., presented an affidavit and motion for continuance. (Tr. 4-8.)

The reason stated for the continuance was that Mr. Hutson had retained Mr. McNabb as a defense attorney on April 16 and that Mr. McNabb had no knowledge of the case and, therefore, needed a continuance in order to properly prepare the defense. The U. S. Attorney presented strenuous argument against the continuance and pointed out to the Court that while Mr. Gore had been R. J. McNealy's law clerk in 1954, he had left McNealy's office and joined forces with Mr. McNabb. The U. S. Attorney pointed out that Gore had represented Hutson continuously; that Gore was in Court ready for trial and that the mere fact that McNabb was the attorney of record was not ground for continuance. (Tr. 21-22.)

Mr. McNabb then states; "the mere fact that there is an employee, employer relationship presently existing between Mr. Gore and myself does not necessarily mean that I am familiar with everything that is in his mind." (Tr. 23.)

The Court denied the motion for the continuance.

At the end of the government's case, the U. S. Attorney, realizing that the defense would seek to raise the denial of the motion for continuance as error in the event of an appeal, stated:

> "Mr. Stevens. Having in mind the record here, your Honor, I wish to state for the record that Mr. Gore is still in Court and he has participated with Mr. McNabb as was anticipated and he handled this matter at the preliminary hearing so we believe there has been ample opportunity to ascertain the witnesses. If the defense does not wish to state how many they will call, that is Mr. McNabb's business. But, for the record, Mr. Gore is here. He has handled this matter for over a year for this defendant, and I don't believe the time to locate witnesses is the thing that is putting the trial off." (Tr. 67.)

Following the close of all the evidence, the Court ruled upon the requested instructions presented by both parties and gave counsel opportunity to object to the proposed instructions of the Court. (Tr. 104-108.) Mr. McNabb's objections to the Court's instructions appear on page 106 and 107.

The jury retired at 4:35 P.M. April 19, 1955. At 10:30 P.M. the same day, the jury announced that they were unable to reach a verdict; that they desired "further instructions from the bench", and "a transcript of the testimony of the witnesses". (Tr. 122-123.) The Court denied the request for a transcript, stating that it would take considerable time to produce a transcript, but did give additional instructions to the jury. (Tr. 123.) The jury returned a verdict

of guilty to both counts in the indictment. On May 3, 1955, the District Judge committed the appellant to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten years for the crime of unnatural carnal copulation and for a period of two years for the crime of contributing to the delinquency of a minor, which sentence was to run concurrently with the ten year sentence imposed.

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## SUMMARY OF THE ARGUMENT.

It is unfortunate to note that the appellant proceeding per se, submits the specious arguments presented by Mr. McNabb to the District Court. Mr. Gore represented the appellant throughout the proceedings from the time of the preliminary hearing to the day this Court granted the order allowing withdrawal of counsel. The motion contained the statement that T. N. Gore, Jr. was counsel in fact for appellant. Although Mr. McNabb did all the talking, the Court noticed that Mr. McNabb had conferred continuously with Mr. Gore. The Court gave McNabb an opportunity to confer with him concerning the objections to the Court's instructions. (Tr. 121.) At the time the jury announced that they could not reach a verdict, Mr. Gore appeared representing the appellant. (Tr. 122.)

The government believes that this Court is familiar with the actions of the two attorneys involved (see *Mark Myers v. U.S.,* No. 14,520, Feb. 8, 1956 (9th Cir.)).

The Court refused to release Mr. McNealy until after the motion for continuance was denied, (Tr. 26) and then only upon Mr. Hutson's decision. (Tr. 29.) This denial of the motion for continuance was a matter which rested in the sound discretion of the trial Court, and its ruling should not be disturbed unless the denial was such an action of discretion that it resulted in a substantial prejudice to the rights of the appellant.

The appellant also relies upon the alleged fact that the Court did not grant his trial counsel an opportunity to object to the instructions given by the Court. The record is clear with the exception of the additional instruction given at 10:30 P.M. April 19, 1955, that the Court did permit defense counsel to object to the instructions. (Tr. 106-108, 119-121.) As to the additional instruction, Mr. Gore was present and heard the instruction, but did not make an objection or request an opportunity to do so. Unless it is an extraordinary situation, his counsel having remained silent, the appellant cannot now raise for the first time on appeal, that the Court erred in giving the additional instruction.

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## ARGUMENT.

### I.

### THE DENIAL OF THE APPELLANT'S MOTION FOR A CONTINUANCE WAS NOT REVERSIBLE ERROR.

Appellant has failed to disclose to this Court that Mr. Gore, who was familiar with the case and had ample time to prepare it, was in fact his attorney.

Mr. Gore left the office of Mr. McNealy and became the associate of McNabb. (Tr. 21, 22.) When this change occurred, the appellant retained McNabb as his counsel of record. The appellant had known since January 18, 1955, that his case was to be tried. The trial date was delayed until Mr. McNealy returned from the legislature. He was represented by two experienced attorneys who were present during the trial.

An action of the Court upon an application for a continuance, is not a matter of right but purely a matter of discretion which is not subject to review unless it is clearly shown that such discretion was abused. *(Crono v. U.S.,* 59 F. 2d 339, 341 (9th Cir. 1932)), *(Williams v. U.S.,* 203 F. 2d 85, 86 (9th Cir. 1953)). Considering all the facts and circumstances in the record, the appellant has not clearly shown that the District Court abused its discretion. The failure to secure witnesses was not caused by the denial of the continuance since no witnesses were called by the defense on the second day of trial or any showing made that anyone was subpoenaed to testify.

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## II.

**APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE WAS PROPERLY DENIED.**

The little girl, Virginia Mead, testified that the appellant put his "thing" in her mouth and she asked him for a drink of water. Then she ran next door to the Perry's house and told Mr. and Mrs. Perry what had happened. (Tr. 43, 44.) Mrs. Perry corroborates Virginia's testimony. (Tr. 50-54.) Mrs.

Perry testified that Virginia came to her door around one o'clock barefooted and with no outer wraps; she was crying and in a hysterical state of mind. Mrs. Perry heard a man say, "What do you want to go in and bother them for, honey." Mr. Perry recognized the voice as that of the appellant. (Tr. 60.) Virginia also stated that the appellant told her he had a gun. (Tr. 43.) Mr. Perry testified that the appellant told him he had a 25 automatic under the pillow. (Tr. 64.) The appellant could not leave the children alone in the house with Joe Baird absent, but Mr. Perry found Hutson in his own residence in bed. (Tr. 60.) The inference certainly could be drawn that the appellant was in bed with his clothes upon his person since Mr. Perry did not see any clothing upon entering the room. (Tr. 63.)

There were certain conflicts in the testimony of the little girl, but that is not difficult to understand with appellant's counsel making thirty-two interruptions in fourteen pages of her testimony. The credibility of a witness is for the jury to decide.

Where a victim of a crime against nature does not consent to the act, the victim is not an accomplice and a conviction may be sustained upon the uncorroborated testimony of the unwilling witness. *(State v. Wilson,* 233 S.W. 2d 686 (Mo. 1950)), *(People v. Karpinski,* 111 P. 2d 393, 395 (Calif. 1941).) It is difficult to imagine how an eleven year old girl can be considered an accomplice in a crime against nature in any case and certainly not in the present one where Virginia refused to do the act until the appellant

mentioned the gun. (Tr. 43.) Therefore, the Court did not err in failing to give an instruction that Virginia could be an accomplice. (*People v. Featherson,* 155 P. 2d 685, 687 (Calif. 1945).)

The testimony discloses that appellant put his penis in her mouth. (Tr. 44.) "Any penetration of the mouth, no matter how slight, constitutes a violation of the section". *(People v. Hickok,* 216 P. 2d 140, 145 (Calif. 1950).)

The appellant denied the act (Tr. 97), and this left a factual issue for the jury to decide. This decision was not within the provision of the trial Court and no error was made by denying the motion of acquittal.

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## III.

### THE COURT DID NOT ERR IN GIVING THE ADDITIONAL INSTRUCTION TO THE JURY OR DENYING A TRANSCRIPT OF THE TESTIMONY.

At 10:30 P.M. on the date that the jury retired for deliberation, they returned to the Court and requested additional instructions and a transcript of the testimony. The additional instruction was given to the jury (Tr. 123, 124), and the giving of additional instructions has always been held to be within the discretion of the trial Court. *(Allen v. U.S.,* 186 F. 2d 439, 444 (9th Cir. 1951).)

Mr. Gore made no objection to the instruction at the time, but counsel choose to claim it as error in his statement of points on appeal. Appellant cannot object for the first time on appeal to instructions

unless they are so erroneous that the giving thereof results in plain error. (Rule 30 and 52, Federal Rules of Criminal Procedure.) Surely the giving of this instruction is not such an extraordinary situation as would justify a disregard of the provisions of Rule 30 *(Herzog v. U.S.,* (9th Cir. No. 14,611, May 29, 1956)), because the instruction was very similar to the one approved by the Supreme Court of the United States. *(Allen v. U.S.,* 164 U.S. 492, 501 (1896).)

The trial Court may determine, within its discretion, whether or not the jurors may have a transcript of any or all the testimony in the case. *(C.I.T. Corporation v. U.S.,* 150 F. 2d 85, 91 (9th Cir. 1945).)

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**CONCLUSION.**

For the reason set forth above, appellee requests this Court to affirm the judgment of the District Court.

Dated, Fairbanks, Alaska,
June 18, 1956.

Respectfully submitted,

GEORGE M. YEAGER,
United States Attorney,

PHILIP W. MORGAN,
Assistant United States Attorney,

*Attorneys for Appellee.*

**(Appendix Follows.)**

# Appendix.

ALASKA COMPILED LAWS ANNOTATED, 1949.

65-9-10. *Unnatural crimes.* That if any person shall commit sodomy, or the crime against nature, or shall have unnatural carnal copulation by means of the mouth, or otherwise, either with beast or mankind of either sex, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one year nor more than ten years.

65-9-11. *Contributing to delinquency of child: Suspension of sentence: "Delinquency" defined.* Any person who shall commit any act, or omit the performance of any duty, which act or omission causes or tends to cause, encourage or contribute to the delinquency of any child under the age of eighteen years, or who shall by threats, command or persuasion, endeavor to induce any child to do or perform any act or follow any course of conduct which would cause such child to become a delinquent child, or who shall do any act which manifestly tends to cause any child to become a delinquent child, shall be guilty of a felony and upon conviction there of shall be punished by imprisonment in the penitentiary for not more than two years nor less than one year, or by imprisonment in the federal jail for not more than one year nor less than one month, or by fine of not more than one thousand dollars nor less than one hundred dollars, or by both such fine and imprisonment. Provided, however, that the Court may suspend the execution of sentence for a violation of the provisions hereof,

and impose conditions as to conduct in the premises of any person so convicted and make suspension depend upon the fulfillment by such person of such conditions and in case of the breach of such conditions, or any thereof, the Court may order the defendant arrested and placed in the custody of the marshal as though there had been no suspension.

For the purposes of this Act any child under the age of eighteen years who violates any law of the United States, or of the Territory, or any city or town ordinance; or who is incorrigible, either at home or in school, or who knowingly associates with thieves, vicious or immoral persons, or who, without just cause and without the consent of its parents, or custodians, absents itself from home or its place of abode, or who is in danger of becoming or remaining a person who leads an idle, dissolute, lewd or immoral life or who knowingly frequents a house of ill repute; or who knowingly frequents any place where any gaming device is operated; or who patronizes or visits any public pool room, or who wanders about the streets in the night time without being on any lawful business or occupation, or who habitually wanders about any railroad yards or tracks, or who habitually uses vile, obscene, vulgar, profane or indecent language, or who is guilty of or takes part in or submits to any immoral act or conduct; or who is addicted to the habitual use of intoxicating liquor or any drug, shall be deemed a delinquent child.